UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE MEDIA FORCE MUSIC GROUP, LLC and BIG DEAL RECORDS, LLC,	:	
Plaintiffs,	:	11 Civ. 8442 (PAE)
-v-	:	ORDER
THE ORCHARD ENTERPRISES, INC.,	:	
Defendant.	:	

PAUL A. ENGELMAYER, District Judge:

Plaintiffs The Media Force Music Group, LLC ("Media Force") and Big Deal Records, LLC ("Big Deal") bring this claim against The Orchard Enterprises, Inc. ("Orchard") for breach of contract, conversion, fraud, and unjust enrichment. Orchard moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, Orchard's motion to dismiss is denied.

I. Background[1]

Media Force and Big Deal are limited liability companies organized under the laws of Tennessee. Orchard is a Delaware corporation doing business in New York.

On October 15, 2007, Media Force entered into a licensing agreement with Orchard (the "Agreement"). The Agreement, which superseded a previous agreement between Orchard and non-party Sin-Drome Records, Ltd., grants Orchard exclusive rights to license and distribute

[1] On a motion to dismiss, the Court accepts all factual allegations in the Complaint as true (Dkt. 1). The facts which form the basis of this Opinion are drawn solely from the Complaint. Unless otherwise noted, no further citation will be provided.

certain audio and video recordings. The Agreement provides: "Orchard shall have the exclusive right to sell, copy, distribute, perform, sublicense and otherwise exploit the Recordings (as such term is defined below) . . . ." Compl. Ex. A ¶ 1(a). As defined in the Agreement:

> Master recordings (the "Recordings" herein) shall include all sound recordings and video recordings owned or controlled now or at any time during the Term by [Music Force], record labels affiliated with [Music Force] or which are acquired by [Music Force] or with whom [Music Force] may merge during the term . . . . As of the execution date hereof, the Recordings shall consist of those listed in Schedule A.

Id. ¶ 3(a). In addition, the Agreement also provides Orchard the right to collect income from digital uses of those recordings listed in Schedule A that were not already subject to a digital income agreement binding Media Force or one of its agents. The Agreement provides:

> Orchard shall have the exclusive right to collect all income deriving from the Recordings . . . i.e. income and or levies deriving from digital, reproduction and performance uses . . . if not already collected by [Media Force] or [Media Force's] agent as of the execution date hereof (provided, only if [Media Force] gives Orchard written notice of any such prior collection arrangements promptly following execution hereof).

Id. ¶ 1(b).

The Agreement includes a standard warranty relating to Media Force's ownership of the relevant recordings:

> [Music Force] warrants represents, covenants and agrees that (i) it has the right and authority to enter into this agreement and to grant to Orchard all rights specified, (ii) all of the Recordings, artwork, metadata, videos and any other materials furnished by [Media Force] to Orchard or relating to the Recordings are owned or controlled by [Media Force] and shall not infringe on the copyrights or other rights of any person or entity . . . .

Id. ¶ 8(a). The Agreement also contains a standard indemnity provision which provides that, should the warranty be breached:

> Each party shall defend and indemnify the other party (including its directors, members, officers, employees and other representatives) against any expenses or losses resulting from a third party claim of breach, or a claim which if true would

> constitute a breach, or any of the party's respective representations, warranties, covenants, or agreements contained herein, including reimbursement of reasonable attorneys' fees and litigation expenses. The indemnified party shall give the indemnifying party prompt notice of any claim and, if the indemnified party so requests, the indemnifying party shall defend the indemnified party at the indemnifying party's expense with counsel approved by the indemnified party.

Id. ¶ 8(c). The indemnification provision further provides: "If a claim is made[,] Orchard shall have the right to withhold payment of royalties hereunder in an amount reasonably related to the claim and potential expenses." *Id.*

On November 17, 2007, Media Force furnished Orchard with a list of business entities with which Media Force had agreements to collect digital income. One such company was non-party SoundExchange, a digital rights company.

On December 12, 2007, the parties amended the Agreement to, *inter alia*, modify Schedule A. *See* Compl. Ex. B. ¶ 2. The amended Schedule A includes approximately 77 works covered by the Agreement. One is "Rearview Mirror," a studio album by the artist Don McLean, which includes the iconic song, "American Pie."[2] Media Force had previously acquired the right to commercially release the recordings in "Rearview Mirror," including "American Pie," from non-party EMI Records ("EMI").

In January 2010, Media Force notified Orchard that Big Deal obtained the rights to certain recordings listed in Schedule A. As a result, Big Deal replaced Media Force as the administrator of those recordings. As to those recordings newly controlled by Big Deal, Orchard was to account to Big Deal, and was to pay Big Deal directly, all fees required under the

[2] On May 31, 2012, the Court issued an Order directing the parties to clarify whether the works listed in Schedule A were individual songs or studio albums that each included multiple songs. On June 1, 2012, plaintiffs submitted a letter asserting that the works listed in Schedule A, including "Rearview Mirror," are albums, which encompassed the multiple individual song recordings included therein. On June 4, 2012, Orchard submitted a letter agreeing with plaintiffs' representation.

Agreement arising out of such use. Accordingly, following the January 2010 notification, Orchard paid royalty fees under the Agreement to both Media Force and Big Deal for use of recordings listed in Schedule A.

In April 2010, EMI asserted to both Orchard and Media Force that it had not granted permission to Media Force to use the "American Pie" sound recording.[3] After notifying Media Force of that claim, Orchard began withholding payments otherwise due to Media Force and Big Deal under the Agreement. Orchard claimed to these parties that the Agreement's indemnification provision allowed it to withhold such payments while the dispute with EMI was pending. Around this time, Orchard also represented to Media Force that "it was expecting to settle the claims by EMI against both Defendant [Orchard] and Plaintiff [Media Force]." Compl. ¶ 68. Orchard also directed SoundExchange, the digital rights company bound by a prior agreement with Media Force, to divert payments from Media Force to Orchard.

In January 2011, Orchard entered into discussions with EMI to resolve the dispute over the "American Pie" recording. Orchard told Media Force representatives that it would settle all claims on behalf of both Orchard and Media Force.

In February 2011, contrary to this representation, Orchard disbursed funds to EMI to settle the dispute over the "American Pie" recording, but only as between EMI and Orchard. Media Force was not a party to the agreement between Orchard and EMI. Orchard did not notify Media Force that that funds withheld from Media Force would be used to settle EMI's claims solely as against Orchard.

On November 21, 2011, plaintiffs filed suit in this Court. On February 27, 2012, Orchard submitted its motion to dismiss the Complaint.

[3] Neither parties' pleadings are clear as to precisely what form these assertions took, or whether EMI had indicated that it would bring suit.

II. Legal Standard

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the factual allegations set forth in the Complaint as true and draw all reasonable inferences in favor of the plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To survive a motion to dismiss, a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Id.* A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). To satisfy this standard, plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant acted unlawfully." *Iqbal*, 556 U.S. at 678. Where a plaintiff has not "nudged [his or her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570. Although on a motion to dismiss the Court must accept as true all well-pleaded factual allegations in the Complaint, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

As to claims alleging fraud, Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard. Such claims must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To satisfy Rule 9(b), "a complaint must 'allege facts that give rise to a strong inference of fraudulent intent.'" *Berman v. Morgan Keenan & Co.*, 455 F. App'x 92, 95 (2d Cir. 2012) (quoting *Acito v. IMCERA Grp.*, 47 F.3d 47, 52 (2d Cir. 1995)). Specifically, "the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the

statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292–93 (2d Cir. 2006) (internal quotation marks omitted).

III. Discussion

There are five claims against Orchard: (1) breach of the Agreement, based on its withholding royalties to which plaintiffs were entitled; (2) breach of the Agreement, based on its withdrawing mechanical royalties from Media Force accounts on a quarterly basis; (3) conversion of plaintiffs' property, based on its alleged diversion of SoundExchange payments to which plaintiffs were entitled under a prior agreement; (4) fraudulent misrepresentation, based on the claim that Orchard would disburse withheld funds in order to settle EMI's claim as to both Orchard and Media Force; and (5) unjust enrichment. Orchard moves to dismiss each under Federal Rule of Civil Procedure 12(b)(6).

A. Breach of Contract

To state a breach of contract claim under New York law, a plaintiff must allege: "(i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages." *Johnson v. Nextel Commc'ns Inc.*, 660 F.3d 131, 142 (2d Cir. 2011) (citing *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004)). Orchard asserts that plaintiffs fail to plead the necessary elements with respect both to the claim relating to withholding of payments as well as the withdrawal of mechanical royalties. The Court addresses each claim in turn.

As to the claim of withheld royalties, Orchard argues that plaintiffs fail to state a claim for breach of the Agreement because (1) plaintiffs failed to perform under the Agreement, (2) Orchard did not breach the Agreement, and (3) plaintiffs did not suffer any injury. Orchard argues that plaintiffs fail to allege their own performance under the Agreement because they fail

to plead that Media Force had the right to control the recording "American Pie." This claim is unpersuasive, because the studio album "Rearview Mirror," which contains "American Pie," is listed in Schedule A as a recording covered by the Agreement. *See* Compl. Ex B. Although Orchard is free to pursue in discovery its theory that Media Force did not in fact control the rights to that song, Media Force's representation that it did control those rights, and the inclusion of the recording in Schedule A as attached to the December 12 amendment, together suffice to satisfy Rule 12(b)(6).

Orchard next argues, with respect to the withheld-royalties claim, that plaintiffs fail to allege that Orchard violated the Agreement. It argues that the Agreement explicitly permitted it to withhold royalty payments. The Agreement provides: "If a claim is made[,] Orchard shall have the right to withhold payment of royalties hereunder in an amount reasonably related to the claim and potential expenses." Compl. Ex. A ¶ 8(c). Orchard argues that EMI's claim regarding the "American Pie" recording triggered its right to withhold payments under this provision. However, plaintiffs do not allege that Orchard is, categorically, prohibited from withholding royalty payments. Instead, plaintiffs argue that the amount withheld "far exceeded the precise language and intent of the agreement provision," and that that provision did not entitle Orchard to disburse "withheld funds for its own purpose and without any communication" as to whether and how EMI's claim had been resolved. Pls.' Opp. ¶ 30. Nor does the Agreement's indemnification provision—which entitles each party to indemnification "against any expenses or losses resulting from a third party claim of breach, or a claim which, if true, would constitute a breach"—appear on its face clearly to permit disbursement of withheld funds by the indemnified party in satisfaction of a third-party claim. On a motion to dismiss, with discovery incomplete, the Court cannot resolve the factual question whether the amount Orchard withheld was, as

plaintiffs assert, "unrealistically out of proportion to the claim" by EMI. Pending development of a factual record, it is also premature to resolve whether Orchard's particular actions with respect to the disbursement of the withheld funds violated the indemnification provisions in the Agreement. Compl. ¶ 38. For this independent reason, Orchard's motion to dismiss falls short.

Orchard also claims that plaintiffs fail to allege any damages resulting from Orchard's alleged breach. However, the Complaint does allege that Orchard withheld too much money—*i.e.*, it withheld an otherwise-due royalty payment that was larger than the amount of indemnification to which Orchard was entitled under the Agreement. The Complaint further alleges that Orchard's disbursement of these funds to EMI, prior to resolution of EMI's claims against Media Force, resulted in EMI's claim against Media Force going unresolved, which in turn resulted in Media Force never receiving the portion of the withheld funds it was due under the Agreement (*i.e.*, the residue after proper withholding). These allegations are sufficient.

Accordingly the Court holds that plaintiffs have adequately pled the elements of a breach of contract claim under New York law.

As to plaintiffs' claim of improper withdrawal by Orchard of mechanical royalties, Orchard argues that, under the Agreement, it was authorized to make such withdrawals, and hence that the alleged withdrawals did not constitute a breach. The Agreement provides:

> Orchard shall have the exclusive right to collect all income deriving from the Recordings . . . i.e. income and or levies deriving from digital, reproduction and performance uses . . . if not already collected by [Media Force] or [Media Force's] agent as of the execution date hereof (provided, only if [Media Force] gives Orchard written notice of any such prior collection arrangements promptly following execution hereof).

Compl. Ex. A ¶ 1(b). However, the Complaint alleges that Media Force notified Orchard by email on or around November 17, 2007, about one month after the effective date of the Agreement, that Media Force had a preexisting contractual relationship with SoundExchange

that affected the mechanical royalties which Orchard could otherwise have collected under the Agreement. Prior to this point, Orchard had not collected income from SoundExchange otherwise payable to Media Force; nor, plaintiffs allege, did Orchard attempt to do so for the ensuing two and a half years after notification, until after EMI notified Orchard of its claim relating to the "American Pie" recording. Under these circumstances, Media Force has adequately pled that Orchard was not authorized to collect those media royalties. The Court, accordingly, denies the motion to dismiss plaintiffs' contract claim relating to such royalties.

In an alternative argument, Orchard argues that plaintiffs' breach of contract claim is time-barred. Under New York law, limitations periods set forth unambiguously in an agreement, even if shorter than the statutory limitations period, are honored. *See R/S Assoc. v. N.Y. Job Dev. Auth.*, 98 N.Y. 2d 29, 32 (2002) ("We have long adhered to the sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language.") (internal quotation marks omitted). Here, the Agreement sets out a one-year limitations period for claims arising out of royalty payments. It provides:

> [Media Force] will have no right to sue Orchard in connection with any royalty accounting statement, or to sue Orchard in connection with any monies received in or otherwise relating to the period such statement covers, unless [Media Force] commences the suit within one year after the date the particular statement is rendered and [Media Force] hereby irrevocably waives any longer statute of limitations that may be permitted by law.

Compl. Ex. A ¶ 6(b). Orchard argues that the Complaint, filed November 21, 2011, is time-barred because Orchard began withholding funds in April 2010, some 19 months before the Complaint was filed.

Plaintiffs do not dispute that the operative limitations period under paragraph 6(b) of the Agreement is one year. However, they note, the Complaint does not allege that the act of withholding payment in April 2010 was the breach of the Agreement. Instead, plaintiffs argue

that the breach accrued when plaintiffs disbursed the withheld funds to a third party, allegedly in violation of the terms of the indemnification provision, in February 2011. That claim is timely. The Court therefore denies Orchard's motion to dismiss on this ground.

B. Conversion

To state a claim for conversion under New York law, "a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights." *Martinez v. Capital One, N.A.*, No. 10-cv-8028, 2012 WL 1027571, at *8 (S.D.N.Y. Mar. 27, 2012) (citing *Nat'l Ctr. for Crisis Mgmt., Inc. v. Lerner*, 938 N.Y.S.2d 138, 138–39 (2d Dep't 2012)); *see also Brown v. Kay*, No. 11-cv-7304, 2012 WL 408263, at *7 (S.D.N.Y. Feb. 9, 2012) ("conversion entails an unauthorized assumption and exercise of the right of ownership"). "Interference with a plaintiff's right to possession may be by a wrongful: (i) taking; (ii) detention; or (iii) disposal." *Acevedo v. Citibank, N.A.*, No. 10-cv-8030, 2012 WL 996902, at *11 (S.D.N.Y. Mar. 23, 2012) (citation omitted).

Plaintiffs' conversion claim is based on the assertion that Orchard disbursed funds to EMI that were otherwise due to Media Force and Big Deal under the Agreement, and that the indemnification provision did not permit this, but permitted Orchard to do no more than withhold royalty payments. Orchard seeks dismissal on the ground that it "was authorized to withhold funds when faced with an adverse claim (here, the claim by EMI)." Def. Br. ¶ 46. But that is not the basis of the conversion claim; it is based instead on Orchard's alleged disbursement to a third party, EMI. Such a disbursement, or, "disposal," of funds is cognizable as conversion under New York law. Accordingly, plaintiffs have adequately pled their conversion claim.

C. Fraud

To state a claim of fraud under New York law, a plaintiff must allege: (1) "a material misrepresentation of a fact"; (2) "knowledge of its falsity"; (3) "an intent to induce reliance"; (4) "justifiable reliance by the plaintiff"; and (5) "damages." *Landesbank Baden-Wurttemberg v. Goldman, Sachs & Co.*, No. 11-4443, 2012 WL 1352590, at *1 (2d Cir. Apr. 19, 2012) (slip op.) (citing *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009)). Additionally, "when pleading fraud, to survive a motion to dismiss, 'a party must state with particularity the circumstances constituting fraud or mistake.'" *Brown v. Kay*, 2012 WL 408263, at *8 (citing Fed. R. Civ. P. 9(b)).

Plaintiffs' fraud claim is premised on the allegation that Orchard represented to Media Force that it was in the process of negotiating a settlement of EMI's claims as against both Orchard and Media Force, but in fact did so—and disbursed the funds received from the settlement—for Orchard only. Orchard argues that the Complaint fails to satisfy the heightened pleading standard imposed by Rule 9(b), under which a "strong inference of fraudulent intent 'may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.'" *Landesbank Baden-Wurttemberg*, 2012 WL 1352590, at *1 (quoting *Lerner*, 459 F.3d at 290–91).

Although this claim presents a close question, the Court's judgment is that the facts pled satisfy Rule 9(b). The Complaint alleges that after Orchard's settlement discussions with EMI in January 2011, Orchard made deliberately false statements to Media Force to induce it to believe that Orchard was engaging in negotiations with EMI in order to resolve the dispute as against all parties, including Media Force. In reliance, the Complaint alleges, Media Force "withheld

taking any action in defense of the claims by EMI . . . in expectation that the claim against it would be resolved." Compl. ¶ 65. These allegations are sufficiently specific to give rise to an inference of fraudulent intent, so as to survive a motion to dismiss.

Orchard also argues that plaintiffs fail to state a claim for fraud that is independent of the breach of contract claim. A claim alleging fraud will fail where it "is premised upon an alleged breach of contractual duties" and "the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement." *Cont'l Petrol. Corp. v. Corp. Funding Partners, LLC*, No. 11-cv-7801, 2012 WL 1231775, at *10 (S.D.N.Y. Apr. 12, 2012) (citing *McKernin v. Fanny Farmer Candy Shops, Inc.*, 176 A.D.2d 233, 234 (2d Dep't 1991)). Therefore, to maintain a claim for fraudulent inducement that does not merge with a breach of contract claim, a plaintiff must "(i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19–20 (2d Cir. 1996); *see also Rojas v. Don King Prods.*, No. 11-cv-8468, 2012 WL 760336, at *4 (S.D.N.Y. Mar. 6, 2012) (quoting *Bridgestone/Firestone*, 98 F.3d at 20) ("intentionally-false statements . . . indicating [an] intent to perform under the contract . . . [are] not sufficient to support a claim of fraud under New York law").

The Complaint does allege misrepresentations that are collateral or extraneous to the Agreement. It alleges that in early 2011, Orchard falsely represented to Media Force that it would negotiate with EMI in order to resolve EMI's pending claim against both Orchard and Media Force. Taking that allegation as true, this claim does not turn on Orchard's intent to perform under a contract. Rather, it involves the separate duty Orchard allegedly took on with

respect to negotiating on behalf of Media Force with a third-party entity. Accordingly, the fraud claim is not premised on Orchard's alleged breach of contractual duties.

CONCLUSION

For the reasons stated herein, Orchard's motion to dismiss plaintiffs' Complaint is hereby DENIED. For the time being, therefore, "the courtroom [is] adjourned. No verdict [is] returned."[4] The Clerk of Court is directed to terminate the motion at docket number 6.

The parties are directed to submit a jointly proposed case management plan in accordance with the Court's Individual Rules by June 18, 2012. The initial pretrial conference is hereby scheduled for June 29, 2012, at 10:30 a.m. in Courtroom 18C, at the U.S. Courthouse, 500 Pearl Street, New York, New York 10007.

SO ORDERED.

Paul A. Engelmayer
Paul A. Engelmayer
United States District Judge

Dated: June 8, 2012
New York, New York

[4] DON MCLEAN, *American Pie*, *on* REARVIEW MIRROR: AN AMERICAN MUSICAL JOURNEY (Hyena Records 2005).